

STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION

**COPY**

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CITY OF ROCK ISLAND, ILLINOIS,  
a municipal corporation,

Petitioners,

v.

THE BURLINGTON NORTHERN AND SANTA FE  
RAILWAY COMPANY A/K/A BURLINGTON  
NORTHERN RAILROAD COMPANY,

Respondent.

Illinois Commerce Commission  
RAIL SAFETY SECTION

No. T 02-0114

**RESPONDENT'S MOTION TO STRIKE AND DISMISS  
PETITIONER'S PETITION FOR AN ORDER GRANTING PERMISSION  
TO BUILD A PEDESTRIAN WALKWAY ACROSS A RAILROAD TRACK AND  
FOR AN ORDER APPROVING CONDEMNATION OF REAL ESTATE**

Now comes respondent, The Burlington Northern and Santa Fe Railway Company ("BNSF"), by its attorneys, Kenneth J. Wysoglad & Associates and moves the Illinois Commerce Commission for an order striking and dismissing petitioner's petition for an order granting permission to build a pedestrian walkway across a railroad track and for an order approving condemnation of real estate. In support thereof, respondent states as follows:

**Petitioner's unverified petition must be stricken**

1. City of Rock Island, Illinois filed with the Illinois Commerce Commission petitioner's unverified two count petition. In Count I of its petition the City of Rock Island requests an order from the Illinois Commerce Commission authorizing and requiring the installation of a stand alone pedestrian at grade crossing to be equipped with automatic warning devices, with the cost to be

**DOCKETED**

divided among the parties in accordance with law. In Count II of its petition the City of Rock Island requests authority to initiate eminent domain proceedings against respondent to acquire an easement in gross as to approximately two acres of BNSF property.

2. Section 200.130 of the Illinois Commerce Commission Rules of Practice, 83 Illinois Administrative Code §220.130 requires that the petition shall be verified by the filing party before a notary public. The petition filed by petitioner, City of Rock Island, Illinois is unverified and, therefore, should be dismissed on this basis alone.

Wherefore, respondent, The Burlington Northern and Santa Fe Railway Company prays that the petition of the City of Rock Island, Illinois be stricken.

**The Petition should be dismissed for lack of subject matter jurisdiction**

1. In its petition, petitioner requests an order from the Illinois Commerce Commission to establish a pedestrian at grade crossing over the tracks of BNSF to accommodate a pedestrian walkway leading to certain botanical center facilities located within the City of Rock Island, Illinois.
2. The Illinois Commerce Commission has no jurisdiction over the matter as the Illinois Commerce Commission does not have authority to establish a "public pedestrian at grade crossing".
3. In relevant part, 625 ILCS 5/18(c)-7401 provides:

"No public road, highway or street shall hereinafter be constructed across the track of any rail carrier at grade...without first having secured the permission of the Commission..." (Emphasis added).

4. The Illinois Vehicle Code defines a "highway" as "the entire width between the boundary line of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel". 625 ILCS 5/1-126.

The Illinois Vehicle Code further defines the term "roadway" as "that portion of a highway improved, designed or ordinarily used for vehicular travel, exclusive of the berm or shoulder. In the event a highway includes two or more separate roadways the term "roadway" as used herein shall refer to any such roadway separately but not to all such roadways collectively." 625 ILCS 5/1-179.

The Illinois Vehicle Code defines the term "street" as "the entire width between boundary lines at every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel." 625 ILCS 5/1-201.

The Illinois Vehicle Code further defines the term "railroad - highway grade crossing" as "the intersection of stationary rails owned or used in the operation of a railroad corporation across a highway." 625 ILCS 5/1-166.1.

5. The Illinois Commerce Commission, by its own regulations, recognized that its jurisdiction is limited to locations where railroad tracks intersect with, or are proposed to intersect with public streets or roadways. In relevant part, the Illinois Commerce Commission has defined the term "crossing" as "...any place where a public street or highway or a railroad cross either at grade or by separation of grades." 92 Illinois Administrative Code §1535.100. The Illinois Commerce Commission further defines the term "roadway" as "...that portion of a street or highway improved, designed or ordinarily used for vehicular travel." and the term "street" as "the entire width between property lines of every way or place of whatever nature when any part is open for use of the public as a matter of right for the purposes of vehicular traffic." 92 Illinois Administrative Code 1535.100.
6. Based on a plain reading of 625 ILCS 5/18(c)-7401 it is clear that the aforesaid statutory section does not confer the Illinois Commerce Commission with jurisdiction concerning the establishment of a public pedestrian at grade crossing of the type and nature sought by the City of Rock Island, Illinois in its petition herein.
7. As the Illinois Commerce Commission does not have authority to order the construction of a public pedestrian at grade crossing, petitioner's petition should be dismissed.

Wherefore, respondent, The Burlington Northern and Santa Fe Railway Company prays that the Illinois Commerce Commission enter an order striking and dismissing petition of petitioner, City of Rock Island, Illinois.

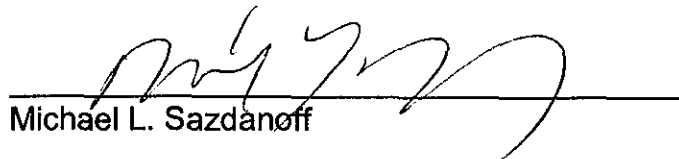
**Motion to Dismiss Count II for insufficiency of pleading**

1. In Count II of its petition petitioner seeks authority to initiate eminent domain proceedings against respondent to acquire an easement in gross over and across the operating right of way and trackage of respondent. Petitioner further seeks to initiate eminent domain proceedings to obtain an easement over certain other property owned by respondent. In its petition, petitioner provides no explanation or statement as to its need for the at issue properties or petitioner's intended use of the proposed easement areas. Without setting forth any basis for its request or explanation for petitioner's need for the property, plaintiff seeks authority to condemn an easement over approximately two acres of respondent's property.
2. Petitioner's bare bones allegations as set forth in Count II of its petition is insufficient to permit respondent to effectively respond to or defend against the matters raised in Count II of the petition. Similarly, the allegations contained in Count II of the petition are inadequate to apprise the Illinois Commerce Commission of the matter so that the Illinois Commerce Commission can evaluate and make a rational determination on the issues.
3. Count II of petitioner's petition should be dismissed and petitioner should be required to file, if it desires, an amended Count II setting forth additional alleged facts specifying petitioner's need for and intended use of the subject

properties, the effect petitioner's proposed use and development of the easement areas will have on respondent's rail operations and facilities and petitioner's alleged efforts to obtain the proposed easement locations through voluntary negotiation.

Wherefore, respondent, The Burlington Northern and Santa Fe Railway Company, prays that Count II of the petition be dismissed for insufficiency of pleading.

KENNETH J. WYSOGLAD & ASSOCIATES

  
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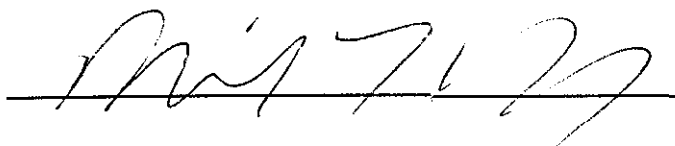
## PROOF OF SERVICE

Michael L. Sazdanoff, being first duly sworn on oath, deposes and says that on the 16<sup>th</sup> day of DECEMBER, 2002, he caused to be served, a true and correct copy of **MOTION TO STRIKE AND DISMISS PETITIONER'S PETITION FOR AN ORDER GRANTING PERMISSION TO BUILD A PEDESTRIAN WALKWAY ACROSS A RAILROAD TRACK AND FOR AN ORDER APPROVING CONDEMNATION OF REAL ESTATE** upon:

Mr. Phillip E. Koenig  
Konecky, Koenig, Kutsunis and Weng  
1515 Fourth Avenue, Suite 301  
Rock Island, Illinois 61201

Mr. Henry Humphries  
Illinois Commerce Commission  
527 E. Capitol Avenue  
Springfield, Illinois 62701

by depositing same in the U.S. Mail depository located at Adams and Clinton Streets, Chicago, Illinois in an envelope(s) with first-class postage, prepaid.

A handwritten signature in cursive script, appearing to read "Michael L. Sazdanoff", is written over a horizontal line.